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## PENALTIES AND FORFEITURES

### BEFORE PEACHY *v.* THE DUKE OF SOMERSET

ON the jurisdiction of chancery to relieve against penalties and forfeitures, *Peachy v. The Duke of Somerset*<sup>1</sup> is usually cited as the leading case. Simple enough on the facts, the parties concerned were sufficiently important to insist on a very thorough discussion of the law. We are told that it "held three days" and was "solemnly debated"; hence the arguments of counsel and the judgment of the chancellor took a wider range than will be found in previously reported decisions. It discloses just how far equity jurisdiction had developed in this class of cases by the first quarter of the eighteenth century, forming a convenient stopping point for a review of the earlier law.

The penal obligation, as known to-day, is a product of Roman law. Probably, in the earliest period of contract, stipulations (*stipulatio*) for the payment of money were alone valid, so that the practical mode of stipulating for a collateral act was to make the payment of a sum of money conditional on the non-performance of the act desired. The amount of the *poena* had no measure except the will of the parties, and it might be recovered in full, although exceeding the value of the act or forbearance stipulated for.<sup>2</sup> Later, an equity in favor of actual damages was recognized

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<sup>1</sup> 1 Strange 447 (1720), s. c. Prec. Ch. 568, 2 Eq. Ca. Abr. 227; 2 WHITE AND TUDOR, LEADING CASES IN EQUITY, 8 ed., 255.

<sup>2</sup> JUSTINIAN, INSTITUTES, 3, 15, 7 (Moyle's 5 ed.); DIG. 4, 8, 32; 21, 2, 56.

in some cases although not in all;<sup>3</sup> indeed, there were many debatable points on this subject still unsettled at the close of the Classical period, as is reflected in modern continental jurisprudence. The French civil code provides: "When the contract stipulates that the party who fails to execute his obligation shall pay a certain sum as damages, neither a greater nor a less sum can be granted the other party." But elsewhere it is said: "The penalty may be modified by the judge whenever the principal obligation has been executed in part."<sup>4</sup> The German civil code provides: "If a forfeited penalty is disproportionately high, it may be reduced to a reasonable amount by judicial decree obtained by the debtor. In the determination of reasonableness every legitimate interest of the creditor, not merely his property interest, shall be taken into consideration. After payment of the penalty the claim for reduction is barred."<sup>5</sup>

Stipulations for the performance of collateral acts were uncommon in the early period of the Roman law. We are told that they were used chiefly in the creation of servitudes upon provincial lands. The older modes of constituting servitudes by *in jure cessionis*, or by *mancipatio*, could not be applied to *praedia provincialia*; hence the occupiers of land in the provinces resorted to the solemn contract, *stipulatio*, by which the owner bound himself to allow its enjoyment or in default to pay a penal sum.<sup>6</sup> The stipulation, it is needless to say, was the formal contract of the Roman law entered into by question and answer (*dari spondes? spondeo*), having distinct procedural advantages; a written memorandum of the act was merely a convenient means of proof. But, as time went on, practice gave increasing importance to the writing,<sup>7</sup>

<sup>3</sup> HUNTER, ROMAN LAW, 652, citing DIG. 44, 4, 4, 3. Cornelius compromised a claim against Maevius for 60 aurei, but Maevius inconsiderately agreed to a penalty of 100 aurei if he did not keep the terms of the compromise. Cornelius could not recover more than was really due — namely, 60 aurei; and if he demanded more, could be defeated on the ground of bad faith (*exceptio doli mali*).

<sup>4</sup> CODE CIVIL, arts. 1152, 1231. So also the ITALIAN CIVIL CODE, art. 1214, and the SPANISH CIVIL Code, art. 1154. See SWISS FED. CODE OF OBLIGATIONS, arts. 179 to 182; POTIER, OBLIGATIONS, pt. 2, ch. 5, and, for Scotland, Lord Elphinstone *v.* Monkland Iron Co., 11 App. Cas. 332, at p. 436 (1886); Forrest *v.* Henderson, 8 M. 187 (1869).

<sup>5</sup> GERMAN CIVIL CODE, art. 343. See notes to Official French Edition (1904).

<sup>6</sup> GAIUS, II, 31; INSTITUTES, II, 3, 3 and 4 (Moyle's 5 ed.); SOHM, INSTITUTES, § 80, 2.

<sup>7</sup> INSTITUTES, III, 19, 12. Hence the *cautio fide jussoria*.

and the stipulation, the very essence of the contract, passed to the stage of a formal recital "*M rogavit T promisit*" and was finally absorbed by the very instrument upon which it conferred its efficaciousness. The *cartae* of the Frankish period resembled their imperial predecessors, and, Roman and Barbarian uniting in a common practice, the surety and the pledge were replaced in charters by penal clauses,<sup>8</sup> developing a form of written obligation useful to the money lender and destined to a permanent place in books of precedents. So, when Britannia had grown sufficiently cosmopolitan to become a borrower, it was the mediæval Italian banker who seems to have brought into common use in England the penal bond, where, we are told, documents of a purely obligatory character were rare before the latter part of the thirteenth century.<sup>9</sup>

The rapid spread of this form of obligation is explained by the fact that it was well adapted to evade the canonical prohibition of interest on loans, regarded as usury and therefore unlawful for a Christian,<sup>10</sup> and that by the time interest was made lawful<sup>11</sup> it had become firmly established as a common form of conveyancing. The early cases show a close scrutiny of such transactions. In *Umfraville v. Lonstede*,<sup>12</sup> in 1308, debt was brought on a bond conditioned to deliver a writing on a certain day. The defendant pleaded that he was in the East that day but had left the writing at home for delivery and that the plaintiff had not been damaged by the failure to deliver on the day named. The plaintiff insisted that the condition had not been fulfilled, whereupon Bereford, J., said: "You demand this debt because the writing was not delivered and he says that before now he has tendered it, and that

<sup>8</sup> BRISCUAD, HISTORY OF FRENCH PRIVATE LAW, Amer. ed., 489, and authorities cited in note. The penalty at one time served the purpose of indemnifying the successful party for costs which were not awarded in the early lay courts.

<sup>9</sup> "Occasionally there was an agreement for a penal sum which was to go to the king, or to the sheriff, to the fabric fund of Westminster Abbey, or to the relief of the Holy Land." 2 POLLOCK & MAITLAND, 224. See John of Oxford's form book, 7 LAW QUART. REV. 65, for a penal bond of the year 1274.

<sup>10</sup> GRATIAN, II, 14, 4, 7; DEC. GREG. 5, 19, *de usuris*; KAMES, III, ch. 11, p. 279; 3 BL. COMM. 434; HAWKINS, P. C., bk. 1, ch. 29. § 7; Viner's ABR., USURY; BACON'S ABR., USURY; FONBLANQUE, Eq., bk. 1, ch. 4, § 7; GLANVILLE, bk. 7, ch. 16; bk. 10, ch. 3; DIALOGUE DE SACCARIO, bk. 2, § 10.

<sup>11</sup> 37 HEN. VIII, ch. 9. See, however, the Money-lender's Act of 1900 (63 & 64 VICT., ch. 5).

<sup>12</sup> Year Book, 2 & 3 EDW. II (Selden Society), p. 58.

he tenders it now, Therefore it is well that you receive it. Moreover, this is not, properly speaking, a debt; it is a penalty, and with what equity (look you!) can you demand this penalty?" No judgment is recorded, and while it cannot be assumed that the court would have gone so far as to give judgment against the letter of the bond, there is evidently a very marked disinclination to enforce it.

In 1313-14 there is another glimpse of the attitude of the royal judges toward such contracts.<sup>13</sup> Thomas Scott, at the Eyre of Kent, brought debt against Hamon of Beracre for thirty pounds, averring that by an indenture the parties had submitted certain matters in dispute between them to arbitration and had bound themselves in thirty pounds to perform the award; that the arbitrators had awarded fifteen pounds to Thomas, which Hamon had refused to pay, whereby action accrued. Passeeley, of counsel for Hamon, said: "This action of debt is based upon a penalty and savors of usury, of which the law will not permit you to have recovery. For example, if I say that I hold myself bound to you to pay you ten pounds upon such a day, and that if I do not pay them to you upon that day, I am then bound to you in forty pounds; and if I fail to pay the ten pounds upon the appointed day, the law will not allow you to recover, by way of usury, the forty pounds." To which Staunton, J., replied: "Penalty and usury are only irrecoverable where they grow out of the sum in which the obligee is primarily bound, but what is claimed here is claimed as a debt arising out of covenant as appears from what has gone before." The court, it is evident, is prepared to distinguish a primary from a collateral covenant. On the other hand, if the illustration put by counsel represented current opinion, such opinion must have undergone a change, for in 1352<sup>14</sup> a case was before the Court of Common Pleas where debt had been brought on a bond in which the obligor bound himself to pay nine marks at a certain day, and, if not paid at the day, to pay seventeen marks. Skip. (Skipwith?) argued that the action sounded in usury, but the court gave judgment for the seventeen marks and six marks damages.

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<sup>13</sup> Eyre of Kent, 6 & 7 EDW. II, vol. II (Selden Society), pp. 24 *et seq.* There are two reports of this case. Hamon, after failing on the plea of usury, denied the award, but before the jury trial the case was settled.

<sup>14</sup> Year Book, 26 EDW. III, 17.

It is unnecessary to go further into the abundant material on the subject of usury to be found in the early reports and abridgments. The canonical rule, based on the old economic conditions under which borrowing was merely the last resort of the improvident or the necessitous, could not survive the new capitalism founded on credit and the productive employment of surplus earnings. There are modern critics of this newer economy, and time's irony may revive the prejudice of antiquity against interest; but we need not concern ourselves with that at present. It may, however, be noted, in passing, that ingenuity in the invention of devices to evade the law, especially where that law is doctrinal and externally imposed, is not the modern phenomenon that some would imagine. The efforts of the courts during this period were principally directed to distinguishing between agreements where the penalty was truly conditional, where the borrower could wholly discharge himself by repayment within a given time, and where the written condition was but a subterfuge, and the real intent of the parties was that the loan should not be repaid without the added sum, by whatever name called.<sup>15</sup>

With mediæval subtlety the careful conveyancer endeavors to avoid the perils of the defense of usury by unscrupulous debtors. A contingency is essential; the single bill under seal is, for procedural reasons, if no other, the most efficacious instrument of the day; so let the obligation be drawn for a round sum — say twice the amount of the loan — with a clause of defeasance, or perhaps a defeasance in a separate instrument, declaring the obligation void on payment of the loan on a particular day; then the condition or defeasance will be collateral to the bond, and, being in favor of the obligor, must be strictly performed to discharge the major obligation which otherwise will remain single.<sup>16</sup> So, also (to this day, in fact, in such instruments), the suspicious

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<sup>15</sup> Burton's Case, 3 Co. 139 (1591); Button *v.* Downham, Cro. Eliz. 643 (1598); Fountain *v.* Grymes, Cro. Jac. 252 (1610); Roberts *v.* Trenayne, Cro. Jac. 507 (1616); Oliver *v.* Oliver, 2 Rolle Rep. 469 (1624); COMYN, DIGEST, USURY.

<sup>16</sup> Fowell *v.* Forrest, 2 Saund. 475 (1670), n.; Bond *v.* Richardson, Cro. Eliz. 142 (1588); Abbot *v.* Rookwood, Cro. Jac. 594 (1620); Kniveton *v.* Latham, Cro. Car. 490 (1637). In the case of a separate defeasance it was perilous, also, for the obligee to decline payment when tendered, as it might discharge the obligation if rightly made. Co. LITT. 207; Year Book, 33 HEN. VI, 2; Year Book, 7 EDW. IV, 3 & 4; Panel *v.* Nevel, Dyer 150 *a* (1556); Cotton *v.* Clifton, Cro. Eliz. 755 (1599); Peytoe's Case, 5 Co. 14 (1611); Trevett *v.* Aggas, Willes 107 (1738).

word "penalty" will be avoided by the scrivener; the obligation will be for "lawful money" and the condition for the payment of a "just sum" or "full sum," as local practice dictates,<sup>17</sup> although court and counsel, long assured of the validity of the transaction, have not hesitated to call the instrument by its true name — a penal obligation.

Nevertheless, the penal bond would not have won its way to legal favor had it not met an economic need of the time, a time, it may be noted, that did not look with disfavor on the strict enforcement of forfeitures of estates and interests in land for condition broken.<sup>18</sup> In fact, the writers of the period group together, as of one genera, problems connected with conditions annexed to personal obligations and those connected with conditions annexed to interests in land,<sup>19</sup> although many of the latter may be regarded as rational developments of feudal law, by which the services of the vassal are incidents of the fief. Contract and property law were swept along together, bound by ever tightening chains of precedent, in the development of doctrines, harsh and narrow perhaps, but capable of being understood and applied, a point not altogether to be despised in times of disorder and low credit.<sup>20</sup> If the law bore heavily upon the individual, at least there was a known law, the certainty of which had become the "safety of all."

But a doctrine predicated wholly on the principle that he who has promised shall not be able, under any pretext, to free himself from literal performance and the consequences of non-performance, must, sooner or later, come into conflict with those humanitarian ideals, due to an awakening consciousness of the claims of the individual, that would take into account the exceptional in the law. Casuistry is the first avenue of escape from this moral dilemma, as may be detected in that very ancient and widespread tale of the

<sup>17</sup> The Young Clark's Guide (1670); Select Cases in Court of Requests (Selden Society), 13. Compare any modern form book. There was no hesitation in using the word "*poena*" in recognizances in criminal procedure. Dalton's Justice (1666), Ch. 134.

<sup>18</sup> II BL. COMM. 153; II STORY, EQUITY JURISPRUDENCE, 13 ed., §§ 1304-1311.

<sup>19</sup> CO. LITT. 206; FULBECKE, PARALLEL, pt. 2, 59; PERKINS, PROFITABLE BOOK, §§ 783 *et seq.*; SHEPPARD, TOUCHSTONE, ch. 21, and the title "Conditions" in the abridgments.

<sup>20</sup> Compare 3 ANCIENT LAWS OF IRELAND, 13, *Senchus Mor*: "There are three periods at which the world is worthless: the time of plague; the time of general war; the dissolution of express contracts."

bond for a pound of flesh, immortalized in "The Merchant of Venice."<sup>21</sup> There craft meets craft and the usurer is circumvented by what Von Ihering plainly described as pettifoggery,<sup>22</sup> but the popularity of the story, in spite of a dénouement that offends a nicely balanced sense of justice, clearly indicates that the mediæval mind was already, perhaps unconsciously, in revolt against the harshness, the excessive literalism of the law, of which the merchant's bond was but a symbol.

To the court of chancery fell the task of moulding the law of penalties and forfeitures into harmony with more humane standards of conduct, a task slowly performed and still uncompleted.<sup>23</sup> There was a precedent for relief against forfeitures at the canon law in the case of the *emphyteuta* who, if he had forfeited his interest by Roman law through failure to pay the rent and taxes,<sup>24</sup> could, under the canon law, avoid the loss by *celeri satisfacione* if the proprietor had not acted or resorted to law.<sup>25</sup> But this interest in land was unknown in England and the doctrines of the canonists were not welcomed in property law. It would seem, also, that at one time it was at least debatable in a court of law whether relief should not be given in case of accident. In 1366<sup>26</sup> it was said in the course of argument by Chelr. (Chellery?): "If you are bound to pay me a certain sum of money, and you are robbed on the way, you are not excused and absolved by this." To which Kirton. (Kirketon?) replied: "Certainly you will be." Brooke thought the colloquy of sufficient importance to note it in his abridgment.<sup>27</sup> But the doubt could not have been for long, as Sir Edward Coke gives just such an incident as the typical case for equitable relief only.<sup>28</sup>

<sup>21</sup> The various sources will be found in the appendix to Dr. Furness' *Variorum edition*.

<sup>22</sup> Der Kamp ums Recht. But see on the other side Kohler's *Shakespeare von der Forum der Jurisprudenz*; *Shylock v. Antonio*, judgment affirmed, by George Wharton Pepper, Esq., 40 AMER. LAW REG. 224 (1892). The ethical weakness of the plot lies, not in the judgment, which is quite in the spirit of mediæval reasoning, but in the way in which Shylock is tricked by hints of a decision in his favor into agreeing to the substitution of Portia for the jurisconsult previously appointed and then is overwhelmed.

<sup>23</sup> For example, neither law nor equity has dealt adequately with oppressive instalment contracts.

<sup>24</sup> CODE 4, 66, 2; NOVELS, 7, 32.

<sup>25</sup> DEC. GREG. 3, 18, 4.

<sup>26</sup> Year Book, 40 EDW. III, 6.

<sup>27</sup> BROOKE'S ABR., OBLIGATION, 9.

<sup>28</sup> "Accident, as when a servant of an obligor, mortgagor, etc., is sent to pay the

There was hesitation, at first, in granting relief where the complainant had lost his remedy at law through his own negligent conduct. In 1482<sup>29</sup> one bound by statute merchant paid the debt without taking a release. When execution was issued the conusor complained to the chancellor, Rotterham Archbishop of York, who took the opinion of the judges, in the exchequer chamber, as to whether he should grant a *subpæna*. Fairfax, J., said the record would be contradicted. The chancellor interposed that such was the common course in trusts, but Hussey, C. J., assured him that in this case the conusor, who through his own negligence had failed to take an acquittance, was really seeking to disprove matter of record, to which the chancellor agreed, as it was the case of a statute merchant, a debt of record. But in 1491<sup>30</sup> the chancellor, Archbishop Morton, remarked in the course of argument: "If one pays a debt on obligation and does not take a receipt, it is good conscience and yet no bar at law." Which Chief Justice Hussey did not dispute. Upon this very point a sergeant at law took issue with St. Germain who, in the "Doctor and Student," had stated that in such a case the party might be aided by *subpæna* in chancery.<sup>31</sup> "It is not reasonable," said the sergeant, "that for a particular manne's cause, whith hath hurte himselfe by his owne folly, that the good common lawe of the realme (which is this, that the matter in writinge with or without condition cannot be answered but by matter in writing or by matter of recorde) should be made voyd or be set at nought by the suite of any particular person made in the chauncerie or any other place."<sup>32</sup> Nevertheless the "good common law," or rather the common

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money on the day, and he is robbed, etc., the remedy is to be had in this court against the forfeiture." 4 Co. INST. 84. So, Cary's Reports, 1, "The like favor is extendable against them that will take advantage upon any strict condition, for undoing the estate of another in lands, upon a small or trifling default." In SPENCE, EQUITY, 629 n., a case in 1579 is cited where relief was given to a person prevented from performance by an extraordinary flood. See also Lawrence *v.* Brasier, 1 Ch. Ca. 72 (1666).

<sup>29</sup> Year Book, 22 EDW. IV, 6.

<sup>30</sup> Year Book, 7 HEN. VII, 11 & 12. *Accord*, Strong's Case, Bulst. 158 (1611). Compare Vincent *v.* Beverlye, Noy 82; Brightman's Case, Latch 148. Archbishop Morton, the chancellor, had taken the degree of doctor of laws at Oxford and had practised as an advocate in the court of arches, 5 FOSS, JUDGES, 60.

<sup>31</sup> DOCTOR AND STUDENT, DIALOGUE 1, ch. 12.

<sup>32</sup> 1 HARGREAVE, LAW TRACTS, 324. See reply to this tract, p. 332, in the same volume.

lawyers, had to yield the point, for by the beginning of the seventeenth century a penalty incurred through negligence, if trifling and unintentional, would be relieved.<sup>33</sup>

The next step was to formulate a general policy of relief against penalties where compensation could be made, a step said by Lord Mansfield<sup>34</sup> to have been vainly urged upon the courts by Sir Thomas Moore during his chancellorship. The meagreness of the early equity reports makes it difficult to fix accurately the time when this policy was finally adopted (Spence says<sup>35</sup> in the reign of Charles I), and, logically, it could not long be delayed when the mortgagor's right to redeem was established. Certainly by the time of the Restoration it could be said: "It is a common case to give relief against the penalty of such bonds to perform covenants, etc., and to send it to a trial at law to ascertain the damages in a *quantum damnificatus*."<sup>36</sup> So, also, it became the common course to relieve against forfeitures for non-payment of rent, and upon payment of arrears to compel the landlord to make a new lease.<sup>37</sup> Richard Francis summarizes the principle in his twelfth maxim: "Equity suffers not advantage to be taken of a penalty or forfeiture where compensation can be made." While text-writers have shown an inclination to consider this as a branch of equity jurisdiction to relieve against accidents, the decisions cannot be so limited, the facts, in many instances, showing default pure and simple. Relief was given in chancery as the principal agency of law reform and was justified by public opinion, hostile to catching

<sup>33</sup> Cook *v.* Orrell, Choyce Cases in Chancery, 136 (1579); Owen *v.* Jones, Cary 75 (1579); Earl of Oxford's Case, 1 Ch. Rep. 1, 8 (1615) *semile*; Saunders *v.* Churchill, Toth. 180 (1634-5).

<sup>34</sup> Wyllie *v.* Wilkes, Dougl. 519 (1780).

<sup>35</sup> SPENCE, EQUITY, 630. See Malton *v.* Pennell, Toth. 29 (1636-7).

<sup>36</sup> 1 EQUITY CASES, ABR.; 91. See Hall *v.* Higham, 3 Ch. Rep. 3 (1663); Wilson *v.* Barton, Nelson 148 (1671); Friend *v.* Burgh, Finch 437 (1679); Varnee's Case, 2 Freem. 63 (1680); Cage *v.* Russel, 2 Vent. 352 (1681); Hele *v.* Hele, 2 Ch. Ca. 87 (1682); Hayward *v.* Angell, 1 Vern. 222 (1683); Hale *v.* Thomas, 1 Vern. 349 (1685); Grimston *v.* Bruce, 1 Salk. 156 (1707); Aylet *v.* Dodd, 2 Atk. 238 (1741).

<sup>37</sup> Baker *v.* Orlibeare, 2 Freem. 92 (1685); Anonymous, 2 Freem. 116 (1690); Bowen *v.* Whitmore, 2 Freem. 192 (1693). See Poore *v.* Oxenbridge, Toth. 104 (1602). The Act of 4 GEO. II, ch. 28, limited the time within which the tenant might file a bill to six months after ejectment and dispensed with the necessity for a new lease. See Common Law Procedure A of 1852 (15 & 16 VICT.), ch. 76, §§ 210-12. Bowser *v.* Colby, 1 Hare 109 (1841), at p. 130; Howard *v.* Fanshawe, [1895] 2 Ch. 581; Dendy *v.* Evans, [1910] 1 K. B. 263.

bargains, which had become proportionately odious as wealth had become more widely distributed and capital more secure. Lord Eldon, characteristically, took pains to express his disapproval of the doctrine of equitable relief against penalties and forfeitures—"a principle," he said, "long acknowledged in this court but utterly without foundation."<sup>38</sup> But, as Mr. Justice Story put it: "There is no more intrinsic sanctity in stipulations by contract than in other solemn acts of the parties which are constantly interfered with by courts of equity upon the broad grounds of public policy on the pure principles of natural justice."<sup>39</sup> And, having adopted the rule, it was only common sense to permit it to be administered at law, as was accomplished by the acts of 8 & 9 William III and 4 Anne, which, in effect, provided that the plaintiff in actions on penal bonds should state the breaches of the condition, and, although entitled to judgment for the amount of the penalty, should be limited in his recovery to the damages proved, the judgment merely remaining as security for further breaches. Payment, also, of principal and interest due by the condition might be pleaded at law, although not made in strict accordance with the terms of the obligation, thus bringing law and equity into accord, at least as to bonds intended to secure money payments.<sup>40</sup>

In the American colonies the problem of relieving against penalties and forfeitures was complicated by the disputes concerning the establishment of courts of chancery,<sup>41</sup> but whatever differences of opinion may have existed as to how and by whom chancery powers should be exercised, it was taken for granted that

<sup>38</sup> *Hill v. Barclay*, 18 Ves. 56 (1811). So also Jessel, M. R., said, in *Wallis v. Smith*, 21 Ch. D. 243, 257 (1882): "It has always appeared to me that the doctrine of the English law as to non-payment of money—the general rule being that you cannot recover damages because it is not paid by a certain day—is not quite consistent with reason. A man may be utterly ruined by the non-payment of a sum of money on a given day, the damages may be enormous, and the other party may be wealthy. However, that is our law. If, however, it were not our law the absurdity would be apparent."

<sup>39</sup> 2 STORY, *EQUITY JURISPRUDENCE*, 13 ed., § 1316. See also the remarks of Lord Mansfield in *Bonafous v. Rybot*, 3 Burr. 1370 (1763).

<sup>40</sup> 8 & 9 Wm. III (1697), ch. 11, § 8; 4 ANNE (1705), ch. 16, §§ 12, 13; 1 Wms. Saunders, 58, n.; *Roles v. Rosewell*, 5 T. R. 538 (1794); *Hardy v. Bern*, 5 T. R. 636 (1794); *Mackworth v. Thomas*, 5 Ves. 329 (1800); *Walcot v. Goulding*, 8 T. R. 126 (1799); *Keating v. Peddrick*, 240 Pa. St. 590, 88 Atl. 11 (1913); *Jennings v. Wall*, 217 Mass. 278, 104 N. E. 738 (1914).

<sup>41</sup> "Courts of Chancery in the American Colonies," by S. D. Wilson, 18 AMER. L. REV. 226, reprinted 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 779.

equity jurisdiction ought to rest somewhere. In the province of Massachusetts, where courts of chancery were not favored, an Act of 1698 provided that "where the forfeiture or penalty annexed unto any articles, agreement, covenant, contract, charter-party, or other specialties, or forfeiture of estates on condition, executed by deed or mortgage, or bargain and sale with defeasance, shall be found by verdict of jury or confession of the obligor, mortgagor or vendor; the justices of the said courts respectively where the tryal is had, are hereby impowred and authorized to moderate the rigour of the law, and on consideration of such cases' according to equity and good conscience, to chancer the forfeiture, and enter up judgment for the just debt and damages, and to award execu-  
tion accordingly."<sup>42</sup> So, also, in Pennsylvania the Court Act of 1710, repealed by the Queen in Council, contained this clause: "Where a penalty is declared for, the plaintiff shall have judgment but for his real debt, interest and charges with such damages as the court shall adjudge,"<sup>43</sup> and the Court Act of 1715, also rejected by the Crown, directed that in actions "on bond or penalty for non-performance of covenants" the proceedings should be in conformity with the statute of 8 & 9 William III.<sup>44</sup> While these acts met the fate that befell so much of the early legislation in this province, nevertheless the statutes of William and of Anne were followed in practice and were included in the report of the judges as in force in Pennsylvania.<sup>45</sup>

But by the time the philosophy of natural justice had thoroughly worked itself into the law, interest had shifted to a newer philosophy of freedom of contract, which in this class of cases finds unconscious expression in the doctrine of liquidated, or stipulated,

<sup>42</sup> Charter and laws of the province of Massachusetts Bay (1742), p. 102. See also Act of 1734, *id.*, p. 301; Laws of Colony of New Plymouth (1836), p. 260, GEN. LAWS REV. 1671, ch. 5, 2, § 5: "That the bench shall have power to determine all such matters of equity as cannot be relieved by the common law, — as the forfeiture of an obligation, breach of covenants without great damage or like matters of apparent equity."

<sup>43</sup> PA. STAT. AT L., vol. 2, p. 301, § 15.

<sup>44</sup> PA. STAT. AT L., vol. 3, p. 73, § 4. As early as 1677 Governor Andros sent this instruction to the justices of the court at New Castle, Delaware: "As to penal bonds or such like cases of equity, it is the custom and practice of courts here, to hear and judge thereof according to equity, which you may also observe as allowed by law."

<sup>45</sup> PENN. ARCH. (2 series), 697. See DUKE OF YORK'S LAWS, 35, 61.

<sup>46</sup> ROBERTS, DIGEST OF BRITISH STATUTES IN FORCE IN PA., pp. 46, 142; ACT of June 14, 1836, P. L. 637, § 1.

damages; that is to say, where the contract is for the performance or non-performance of some act other than the payment of money, and the parties have agreed upon a just and appropriate amount as the damages that will be sustained by the violation of such agreement, equity will not interfere. An early case is *Tall v. Ryland*.<sup>46</sup> Two fishmongers with contiguous shops having settled certain differences that had arisen between them, a bond in £20 was given by one to the other conditioned not to disparage his goods. In the words of the reporter: "The plaintiff (the obligor) afterwards asked the defendant's customer whilst cheapening a parcel of flounders, why he would buy of the defendant, and told him those fish stunk, and so the defendant lost that customer," and, very naturally, sued on the bond. The obligor filed a bill in equity to be relieved of a verdict for the penalty, to which the obligee demurred on the ground that "the bond being to preserve amity and neighbourly friendship for the breach of which the plaintiff did submit to pay that penalty, and there can be no trial had to measure the damages for breach of the condition, other than the parties have submitted to." The lord keeper, Sir Orlando Bridgeman, sustained the demurrer, but declared this was "not to be a precedent in the case of a bond of £100 or the like." The smallness of the amount involved unquestionably influenced the lord keeper, yet the case is typical;<sup>47</sup> indeed it is, on the facts, curiously like one recently decided.<sup>48</sup> The reasoning, however, by which the courts have discriminated between penalties and liquidated damages is difficult to follow; some cases may be successfully disposed of as contracts in the alternative, but difficulty in estimating damages can hardly be accepted as a safe criterion. Unliquidated damages are always difficult to determine. The difficulty in a case like *Tall v. Ryland* would be no greater on an issue framed by the chancellor than in an action on the case for slander at law.

It would seem as if, when the principle of relief against penalties

<sup>46</sup> 1 Cases in Chancery, 183 (1670), s. c. 1 Eq. Ca. Abr. 91.

<sup>47</sup> See also *Woodward v. Gyles*, 2 Vern. 119 (1690); *Small v. Lord Fitzwilliams*, Prec. Ch. 102 (1699); *Lowe v. Peers*, 4 Burr. 2224 (1768); *Rolfe v. Peterson*, 2 Bro. P. C. 436 (1772); *Barton v. Glover*, Holt N. P. 43 (1815); *Tayloe v. Sandiford*, 7 Wheat. 13 (1822).

<sup>48</sup> *Emery v. Boyle*, 200 Pa. St. 249, 49 Atl. 779 (1901).

was finally accepted, the courts must have realized that to carry the principle to its logical conclusion would prevent the parties to a contract from defining in advance the extent of their rights and liabilities, in case of breach. One school of thought, which, to borrow a phrase from the late Professor William James, might be described as "tough-minded," would urge that, as Sir George Jessel put it, courts "should not overrule any clearly expressed intention on the ground that judges know the business of the people better than the people know it themselves."<sup>49</sup> To which the "tender-minded" school would reply that bargaining is not always on equal terms, that the necessities of one party or the superior cunning of the other will frequently upset the balance of risk germane to an executory contract. An excessive sum may be named through overconfidence in the outcome or stipulated *in terrorem* and not as a genuine preëstimate of the obligee's probable or possible interest in the full performance of the obligation. Under such conditions, why should the state, through its courts, lend its aid to secure the fruits of a harsh bargain? In equity both views have had influence, but neither has wholly triumphed. Where the payment of a smaller sum is secured by a larger, the stipulation will be relieved against as penal, but where the agreement is for an act other than the payment of money and the injury that may result from a breach is not ascertainable with exactness, depending upon extrinsic circumstances, a stipulation for damages, not on the face of the contract out of proportion to the probable loss, may be upheld, the difficult cases turning mainly upon the interpretation of the language of the particular contract.<sup>50</sup>

Although classed by text-writers with penalties, forfeitures for acts *in pais* have never stood on exactly the same ground as the former. Where the forfeiture was incurred through accident or mistake and compensation could be made, equity would relieve

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<sup>49</sup> Wallis *v.* Smith, 21 Ch. D. 243 (1882), at p. 266.

<sup>50</sup> Blake *v.* East India Co., 2 Ch. Cas. 198 (1674); East India Co. *v.* Mainston, 2 Ch. Cas. 218 (1676); Taylor *v.* Rudd, 2 Ch. Cas. 241 (1677); Astley *v.* Weldon, 2 B. & P. 346 (1801); Kemble *v.* Farren, 6 Bingh. 141 (1829); Thompson *v.* Hudson, L. R. 4 E. & I. App. 1 (1869); Ward *v.* Hudson Co., 125 N. Y. 230, 26 N. E. 256 (1891); Sun Co. *v.* Moore, 183 U. S. 642 (1901). Equity does not relieve where a penalty or forfeiture is imposed by statute, Keating *v.* Sparrow, 1 Ball & Beat. 367 (1810); Clark *v.* Barnard, 108 U. S. 436 (1883), nor where a forfeiture of shares of stock has been incurred through failure to pay calls, Sparks *v.* Liverpool Water Works, 13 Ves. 428 (1807).

on principles common to all agreements. But in the absence of special circumstances, or statutory authority, equitable relief is now usually confined to cases where the forfeiture is incurred in the failure to meet what is substantially a pecuniary obligation.<sup>51</sup> There was some fluctuation of opinion in arriving at this conclusion. As stated above, it became, before the end of the seventeenth century, the "usual equity" for chancery to relieve a tenant from the forfeiture of his lease for non-payment of rent, upon payment of arrears with interest and costs.<sup>52</sup> This accorded with the tendency of the time to open the doors widely to equitable relief against forfeitures for breach of conditions for money payments not punctually made, and, although the distinction between conditions precedent and subsequent is often mentioned, and some diversity of opinion is indicated, the tendency was to give relief on the basis of compensation, if it could be made, without much regard to the qualities of the condition.<sup>53</sup> On the other hand, equity, in this respect following the law, would not relieve a tenant for years from a forfeiture incurred by assigning the term without the assent of the lessor,<sup>54</sup> nor a copyholder who had forfeited his estate by alienation.<sup>55</sup> Similarly Sir Joseph Jekyll, master of the rolls,

<sup>51</sup> *Mactier v. Osborn*, 146 Mass. 399, 15 N. E. 641 (1888); *Barrow v. Isaacs*, [1891] 1 Q. B. 417.

<sup>52</sup> Anonymous, 2 *Freem.* 116 (1690), and cases in note 37. Copyholders had been relieved as early as the reign of Elizabeth, *Poore v. Oxenbridge*, *Toth.* 104 (1602); *Whistler v. Cage*, *Toth.* 104 (1631). See *Gravenor v. Rake*, *Toth.* 3 (1588).

<sup>53</sup> 1 *FONBLANQUE, EQUITY*, bk. 1, ch. 4, § 1; ch. 6, § 4. In *Popham v. Bampfied*, 1 *Vern.* 79 (1682), it was said by the chancellor, "precedent conditions must be literally performed." *Accord*, *Feversham v. Watson*, 2 *Freem.* 35 (1677); *Falkland v. Bertie*, 2 *Vern.* 333 (1696); *Maston v. Willoughby*, 5 *Viner's Abr.* 93, 12 (1705). But in *Hayward v. Angell*, 1 *Vern.* 222 (1683), the lord keeper said that in all cases where the matter lay in compensation, be the condition precedent or subsequent, there ought to be relief. *Accord*, *Wallis v. Crimes*, 1 *Ch. Ca.* 89 (1667); *Bland v. Middleton*, 2 *Ch. Ca.* 1 (1679); *Woodman v. Blake*, 2 *Vern.* 222 (1691); *Cage v. Russell*, 2 *Vent.* 352 (1681); *Barnardiston v. Fane*, 2 *Vern.* 366 (1699); *Grimston v. Bruce*, 2 *Vern.* 594 (1707), s. c. 1 *Salk.* 156; *Taylor v. Popham*, 1 *Br. Ch.* 168 (1782); *Chipman v. Thompson*, *Walk. Mich.* 405 (1844). Compare where there is a gift over, Anonymous, 2 *Freem.* 206 (1695); *Willis v. Fineux*, *Prec. Ch.* 108 (1699); *Hollinrake v. Lister*, 1 *Russ. Ch.* 500 (1826), and see *Davis v. Gray*, 16 *Wall. (U. S.)* 203 (1872).

<sup>54</sup> *Wafer v. Mocato*, 9 *Mod.* 112 (1724). See *Dumpor's Case*, 2 *Co. 558* (1602); *Northcote v. Duke, Amb.* 511 (1765); *Williams v. Cheney*, 3 *Ves.* 59 (1796). Compare *Cox v. Brown*, 1 *Ch. Rep.* 90 (1656), where the executor sold the lease for payment of debts.

<sup>55</sup> *Brown's Case*, 2 *Co.* 318 (1581); *East v. Harding*, *Cro. Eliz.* 498 (1596).

in *Descarlett a. Dennett*,<sup>56</sup> declined to relieve a lessee who had violated a covenant not to permit passage over a way. "The breach," he said, "tends to the prejudice of the inheritance, inasmuch as it may hereafter amount to an evidence for a prescription over the close."

There were other cases where equitable relief was sought against the enforcement of collateral covenants, where the proper amount of compensation could have been determined without difficulty, certainly with no more difficulty than in the case of many penal obligations relieved as of course. Here conflicting views were presented. In *Thomas v. Porter and the Bishop of Worcester*,<sup>57</sup> in 1668, the bill was by a copyholder to be relieved from a forfeiture for felling trees. There was a wide difference of opinion as to the value of the timber cut, and the lord keeper directed a trial at law upon the issue whether the waste was intentional. The issue was found for the copyholder and relief was granted, but Sir Orlando Bridgeman said, "in case of a wilful forfeiture he would not relieve." Some twenty-five years later,<sup>58</sup> upon a bill by a lessee to be relieved from a forfeiture incurred on several grounds, it was insisted by defendant's counsel, truly enough, that, "Where waste was committed by cutting down great trees, there it was impossible to set them up again." Notwithstanding, the plaintiff was relieved and a reference made to a master to inquire as to the damage by the felling of the trees. In *Cox v. Higford*,<sup>59</sup> the plaintiff, a copyholder who asked for relief, had been, according to the reporter, "guilty of the greatest disobedience possible to his lord," had failed to repair after six presentments and had refused to do fealty either upon oath, or, being a Quaker, upon affirmation. The lord keeper, Sir Simon Harcourt, declared that he ought to have no relief, and, even if he were relieved, the cost of putting the estate in repair would be more than the plaintiff's interest was worth, but he further declared, "that though this were a voluntary waste and for-

<sup>56</sup> 9 Mod. 22 (1722). See also as to prejudicing the inheritance, *Willis v. Fineux*, Prec. Ch. 108 (1699); *Whetstone v. Sainsbury*, Prec. Ch. 591 (1722).

<sup>57</sup> 1 Ch. Ca. 95 (1668). *Bishop of Worcester v. One of his Copyholders*, 2 Freem. 137, s. c. 2 Eq. Ca. Abr. 225.

<sup>58</sup> *Bowen v. Whitmore*, 2 Freem. 193 (1693). So, in *Nash v. Derby*, 2 Vern. 537 (1705), a copyholder was relieved, who had cut timber on one copyhold for repairs on another, the timber being of small value and all employed in repairs.

<sup>59</sup> 1 Eq. Ca. Abr. 121, pl. 20 (1710), s. c. 2 Vern. 664.

feiture (against which it was objected this court never gave relief), yet he thought the rules of equity not so strict, but that relief might even be given against voluntary waste and forfeiture." A few years later<sup>60</sup> ejectment was brought on a lease, and the lessor, on proving a breach of covenant for not keeping a barn well thatched, had a verdict. On bill by the lessee to be relieved, Lord Macclesfield said he could not see what damage the lessor would sustain "if the lessee suffered the buildings to be out of repair, so as he kept the main timber from being rotten, and left all in good repair before the end of the term," and referred the case to a master to see what damage was done, if any. These cases were certainly precedents in favor of Lord Erskine's judgment in *Sanders v. Pope*.<sup>61</sup> But by that time a reaction had set in against the exercise of a discretion so unlimited in relieving against forfeitures of estates,<sup>62</sup> and the influence of Lord Eldon, who, as already stated, strongly disapproved of the principle of equitable relief against penalties and forfeitures, was decisive in confining such relief to money covenants.<sup>63</sup> Ultimately Parliament conferred upon the courts jurisdiction to grant relief in cases of forfeiture,<sup>64</sup> to which Lord Eldon and his contemporaries turned a deaf ear, but their judgments have influenced American opinion, although Mr. Justice Story seriously questioned whether this narrow limitation of the doctrine was defensible upon the original principles which guided courts of equity in interfering in cases of penalties and forfeitures.<sup>65</sup>

There were, therefore, currents and cross currents of opinion when in 1721 Sir Harry Peachy brought his bill against the Duke

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<sup>60</sup> *Hack v. Leonard*, 9 Mod. 91 (1724). See also *Webber v. Smith*, 2 Vern. 103 (1698).

<sup>61</sup> 12 Ves. 282 (1806). *Accord*, *Davis v. West*, 12 Ves. 475 (1806).

<sup>62</sup> *Eaton v. Lyon*, 3 Ves. 690 (1798), at p. 693; *Wadman v. Calcraft*, 10 Ves. 67 (1804).

<sup>63</sup> *Hill v. Barclay*, 16 Ves. 402 (1810), 18 Ves. 56 (1811); *Reynolds v. Pitt*, 19 Ves. 134 (1812); *Bracebridge v. Buckley*, 2 Price 200 (1816).

<sup>64</sup> Power to relieve against breach of covenants to insure was given by the Act of 22 & 23 VICT. (1859), ch. 35, § 4, and against forfeitures under stipulations in leases by the Conveyancing Acts of 1881, ch. 41, § 14, and 1892, ch. 13, § 2. *Barrow v. Isaacs*, [1891] 1 Q. B. 417; *Dendy v. Evans*, [1910] 1 K. B. 263.

<sup>65</sup> 1 STORY, EQUITY JURISPRUDENCE, 13 ed., § 1323; cf. *Baxter v. Lansing*, 7 Paige (N. Y.) 350 (1838); *Munroe v. Armstrong*, 96 Pa. St. 307 (1880); *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. 544 (1892), with *Grigg v. Landis*, 21 N. J. Eq. 494 (1870); *Lundin v. Schoeffel*, 167 Mass. 465, 45 N. E. 933 (1897).

of Somerset to be relieved from a forfeiture of a copyhold estate upon making recompense.<sup>66</sup> It would appear that Sir Harry, and his father before him, owning freehold land adjoining the copyhold, had not observed the limitations upon their rights as copyholders; that a stone quarry had been worked from the adjoining land; that trees had been topped, hedges moved and part of the land let for seven years without the lord's license. There was some dispute as to whether all these acts were, under the circumstances, forfeitures at law, and the bill was retained until this could be decided in ejectment; the lease was admittedly a forfeiture. For the complainant it was urged that "it was a sort of maxim that all forfeitures were odious," that in copyhold cases they were intended as security and the court would relieve where satisfaction could be made. If it was difficult to ascertain damages, that was because there really was no damage. The defendant insisted that "in cases of forfeitures on conditions in law this court seldom relieves" and that all the acts in the present case were "voluntary acts." Lord Chancellor Macclesfield said that the forfeiture resulted from the "imbecility of the copyholder's estate," his tenure was upon the conditions established by the custom of the manor. Non-payment of rent or fines had been relieved, for the forfeiture in that case was only by way of security. "Cases of agreements and conditions of the party and of the law are certainly to be distinguished." It was not sufficient to say that there was no damage in this case, "for it is recompense that gives this court a handle to grant relief. *The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the court gives him all he expected or desired;* but it is quite otherwise in the present case, these penalties or forfeitures were never intended by way of compensation, for there can be none." The chancellor would have dismissed the bill if the

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<sup>66</sup> There are three reports of the case, a summary in 2 Eq. Ca. Abr. 228, a longer one in Prec. Ch. 568, and the most complete in 1 Strange 447, which is reprinted in the various editions of WHITE & TUDOR, LEADING CASES IN EQUITY. It would almost seem as if the reporters derived their facts from opposing counsel. According to Strange the steward's deputy engrossed and witnessed the lease and there were other extenuating circumstances. According to the editor of the Precedents, the plaintiff encouraged other copyholders "to take the same liberty, and expressed great contempt for the lord of the manor, with respect to his authority over his copyholders."

lease had involved all of the land and the other facts had been undisputed. If all were forfeitures at law, as the lease was, equity, he said, would not relieve.

It has been said that in the sentence italicized the chancellor put the jurisdiction in such cases on the only foundation upon which it could be maintained, but the jurisdiction is understated. As Lord Thurlow put it, in *Sloman v. Walter*,<sup>67</sup> "Where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessorial, and therefore only to secure the damage really incurred." A penalty might be security for other acts than money payments; but as to forfeitures, the failure of Sir Harry's bill indicated that relief would not be given merely because compensation could be made; Sir George Jessel could truthfully say: "At all events, long before his (Lord Eldon's) time it had been well settled that equity did relieve from forfeiture for non-payment of money, and I think I may say, in modern times from nothing else."<sup>68</sup> Looking at the arguments of counsel we can appreciate their cogency: "This court would not relieve against the forfeiture, as it could not alter the terms on which the lessor himself thought proper to part with his lands, *or force a tenant upon him in spite of his teeth.* . . . That it would be of the utmost consequence to lords, if the plaintiff should be relieved in this case; for then it would be but endeavoring to keep these things secret for a considerable while, and in time they would grow into an evidence of freehold; or, if the tenant should be found out, it would be only bringing his bill here and all would be safe."<sup>69</sup> To be sure, this was in the court that had established the doctrine "once a mortgage always a mortgage,"<sup>70</sup> but that principle was beneficial to the landowner. So to this day, in the absence of special equities, chancery will view with none too favorable an eye a bill for relief against a forfeiture resulting from breach of covenant, although there may be no intrinsic difficulty in fixing compensation, if the true object of the covenant is to uphold

<sup>67</sup> 1 Bro. Ch. 418 (1784).

<sup>68</sup> *Wallis v. Smith*, 21 Ch. D. 243 (1882), at p. 260.

<sup>69</sup> Prec. Ch., p. 571.

<sup>70</sup> *Tothill* 134; *Noakes v. Rice*, [1902] A. C. 24.

the owner in having his own way with his own land.<sup>71</sup> Acquiescence, however, in the principle is not to be accounted for solely as a feudal survival. The American of urban antecedents, who may almost be classed as a nomad, shows greater resentment toward an injury to his real estate than at a proportionate loss through bad debts. At least it has seemed so to the writer in the instances brought to his attention. The problem no doubt has a psychological element; tangible property — real property in particular — calls for personal care and interest in its management, a not uncommon source of affection.

The larger question is the converse of the problem presented in suits for the specific performance of contracts. There the chancellor must decide whether absolute compliance with the agreement will be ordered, and the judgment, although stated in terms of adequacy of damages, will in reality rest on conceptions, general or local,<sup>72</sup> of what a promisor ought literally to be made to do. Here the effort is to avoid literal performance, and the judgment, although put upon the formula of compensation, will rest on the prevailing view of what a promisor ought positively to be relieved from doing. There is then what the economist would call a conflict of interests, one that must arise from time to time in various forms as society grows and changes and the issue of which must be decided, like many other questions of law, by the economist, or rather by society expressing its economic will. To habitually remake agreements on the strength of circumstances that have subsequently transpired would add an element of uncertainty to bargaining dangerous to freedom of contract and the extension of credit. To refuse to take account of the disproportion between the stipulated consequences of breach and the actual risk of loss would turn such transactions into a speculation. The function of jurisprudence, in the furtherance of progress, is to reduce to a

<sup>71</sup> *Macher v. Hospital*, 1 V. & B. 188 (1813); *Baxter v. Lansing*, 7 Paige (N. Y.) 350 (1838); *Hills v. Rowland*, 4 DeG. M. & G. 430 (1853); *Nokes v. Gibbon*, 3 Drew. 681 (1856); *Brown v. Vandergrift*, 80 Pa. St. 142 (1875); *Parsons v. Smilie*, 97 Cal. 647, 32 Pac. 702 (1893); *Gordon v. Richardson*, 185 Mass. 492, 70 N. E. 1027 (1904); *Willmott v. London R. Co.*, [1910] 2 Ch. 525; *United States v. Oregon R. Co.*, 189 U. S. 116 (1903).

<sup>72</sup> Professor Holland notes (*JURISPRUDENCE*, 11 ed., p. 323) that specific performance of promises to marry were, by Roman-Dutch law, enforced at the Cape until 1838 and in the Transvaal until 1871.

minimum the purely fortuitous elements in the law of obligations, whether from the viewpoint of promisor or promisee, until through economic invention, perhaps insurance,<sup>73</sup> perhaps the development of ideas still unknown to us, the problem itself becomes obsolete.

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<sup>73</sup> KOHLER, *PHILOSOPHY OF LAW*, ch. 7, § 16 (3).